...NARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

W. B. D. COOPER, *Petitioner*

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections, *Respondent*

No. _____

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS

and

PETITION FOR WRIT OF HABEAS CORPUS

---

and

No. 893

Supreme Court, U.S.
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

W. B. D. COOPER, *Petitioner*

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections, *Respondent*

No. _____

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

W. B. D. COOPER, petitioner, respectfully moves this Court for leave to file the annexed petition for writ of habeas corpus under Sec. 2241 of Title 28, U.S.C. The petition for writ of habeas corpus is combined with and presented together with a petition for writ of certiorari under Sec. 1257(3) of Title 28, U.S.C. to review the action of the Court of Criminal Appeals of Texas.

The writ of habeas corpus is prayed for since the petitioner, Dr. W. B. D. Cooper, a licensed Texas physician is presently confined in the Texas penitentiary, being illegally restrained by Dr. George J. Beto, Director of the Texas Department of Corrections. In addition to the illegal restraint, Dr. Cooper's medical license is in jeopardy, an indictment for abortion is pending against him, and his patients in the negro community are in need of his medical services. Dr. Cooper prays for an expeditious consideration of his case.

Dated this 21st day of October, 1970.

Charles E. Benson

CHARLES E. BENSON
512 Citizens Tower
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Counsel for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

W. B. D. COOPER, *Petitioner*

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections, *Respondent*

No._____

PETITION FOR WRIT OF HABEAS CORPUS

and

No._____

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

W. B. D. Cooper, petitioner, petitions the Supreme Court for writ of habeas corpus pursuant to 28 U.S.C. Sec. 2241, and in combination therewith, also prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, entered in the above entitled case on September 4, 1970, styled therein *Ex Parte W. B. D. Cooper*.

REPORT OF OPINION BELOW

There was no written opinion below. The Texas Court of Criminal Appeals denied the application for writ of habeas

corpus of Dr. W. B. D. Cooper, a licensed Texas physician, whose 5-year probated term for felony driving while intoxicated was revoked on the grounds of committing an offense against the state, an attempted abortion. Dr. Cooper was then, and still is, confined in the Texas state penitentiary. The essence of the application was an attack on the constitutionality of the Texas abortion laws, the revocation of probation based thereon, and the legality of the subsequent imprisonment. The application was denied in Ex Parte W. B. D. Cooper, No. 3014 in the Court of Criminal Appeals of Texas, without written order or opinion; however, appended hereto as Appendix A at page 1a is the judgment in Ex Parte W. B. D. Cooper, No. 4084 in the 142nd District Court of Midland County, Texas, which judgment is an integral part of No. 3014 and includes the findings of fact and conclusions of law of the trial judge required by statute as a preliminary to its presentation to the Texas Court of Criminal Appeals. Cause Nos. 3014 and 4084 refer to different stages in a single habeas corpus procedure as called for after final conviction in a felony case by Art. 11.07, 1 Vernon's Texas Code of Criminal Procedure, 1969 Supp. 47, clarified by *Ex Parte Young*, 418 S.W.2d 824 (Tex. Crim. 1967). Since the entire record of the trial court proceedings in Cause No. 4084 is incorporated as an integral part of the Texas Court of Criminal Appeals proceeding, *"Ex Parte Cooper"* hereinafter will refer to the total proceeding which includes both Nos. 4084 and 3014. Under Art. 11.07, the entire transcript with the petition and statement of facts developed in the trial court stage, together with the findings of fact and conclusions of law of the trial judge, are transmitted in their entirety to the Texas Court of Criminal Appeals which is the only court authorized to grant or deny relief after final conviction of a felony.

[Due to the nature of this case and the relief requested herein, a certified copy of the entire record below of Ex Parte W. B. D. Cooper, Cause No. 3014 in the Texas Court of Criminal Appeals, including all of Cause No. 4084, has been

filed with the Clerk of the United States Supreme Court as a part of the docketing process of this combined petition for writ of habeas corpus and for writ of certiorari.]

JURISDICTION

a) Habeas Corpus: The power of the Supreme Court to grant the writ of habeas corpus is conferred by 28 U.S.C. Sec. 2241. 28 U.S.C. Sec. 2242 requires that a petition for habeas corpus to the Supreme Court state the reasons for not making application to the district court of the district in which applicant is held. There are two significant reasons:

1) On June 17, 1970, prior to the presentation of the constitutional issues in *Ex Parte Cooper*, the United States District Court for the Northern District of Texas declared the Texas abortion laws unconstitutional. That case, *Roe v. Wade*, 314 F. Supp. 1217, Civ. No. 3-3690-B, has now been appealed to the United States Supreme Court and is Docket No. 808, October Term, 1970.

In *Ex Parte Cooper* the Texas abortion laws were declared to be constitutional, the declaration being set forth in the conclusions of law contained in Appendix A at page 1a of this petition. Appendix A, dated July 17, 1970, was an integral part of the record considered by the Court of Criminal Appeals of Texas and was considered by that court in denying the application without written order or opinion on September 4, 1970.

Ex Parte Cooper, which was the first time the constitutionality of the abortion law was presented to the Texas courts after *Roe v. Wade* was decided by the three-judge federal court in the U. S. District Court, produced a direct conflict between the holdings of the Texas courts and the federal courts on the issue of the constitutionality of the Texas abortion laws.

2) The petitioner contends that under the view of the three-judge federal court he is being illegally and unconstitutionally restrained by the respondent, Dr. George J. Beto. This presents a question calling for prompt consideration and a final determination of this irreconcilable conflict between the Texas courts and the federal courts so that the petitioner can be granted the relief to which is is constitutionally entitled.

In *Ex Parte Cooper*, all constitutional issues were raised and presented to the Texas courts, and upon the denial of relief, the petitioner had exhausted his remedies in the Court of Criminal Appeals of Texas, and in the state courts, and the matter is now final on the questions involved, as shown by the certificate of the Clerk of the Court of Criminal Appeals of Texas, which has been filed with the Clerk of the Supreme Court and is appended hereto as Appendix B at page 5a. The constitutional matters involved having been fully developed in the state courts, nothing remains to be done which would require the presentation to a federal district court, the matter now is ripe for determination by the court of final resort, the U. S. Supreme Court. A federal district court could not resolve this conflict between the state and federal courts. *Ex Parte Cooper*, the Article 11.07 proceeding, fully presented the constitutional issues and exhausted state remedies. Dr. Cooper is in custody in violation of the Constitution of the United States.

b) Certiorari: The jurisdiction of the Supreme Court to review the action of the Court of Criminal Appeals of Texas in *Ex Parte Cooper* is invoked under 28 U.S.C. Sec. 1257(3). The certificate of the Clerk of the Court of Criminal Appeals of Texas, appended hereto as Appendix B at page 5a, states that with the denying of the relator's petition for writ of habeas corpus, the matter was disposed of by that court, insofar as the questions involved are concerned, therefore, on September 4, 1970, relator exhausted his remedies in the Court of Criminal Appeals of Texas, and that the matter is now final, on the questions involved in that court.

QUESTIONS PRESENTED FOR REVIEW

1) Are the Texas abortion laws, Arts. 1191, 1192, 1193, 1194, and 1196, 2A Vernon's Texas Penal Code 429 - 436, unconstitutionally vague and in violation of the 14th Amendment, and the Amendments included thereunder, and the 9th Amendment, as held in *Roe v. Wade;* or constitutional in the light of *Ex Parte Cooper* insofar as they apply to the voluntary patient-physician relationship in petitioner's case?

2) Was petitioner denied due process and equal protection of the laws when his probation was revoked on the grounds of violation of the Texas abortion laws, such laws having been held unconstitutional in *Roe v. Wade*? Is the violation of this unconstitutional statute an "offense against the state" upon which the revocation of petitioner's probation can be constitutionally predicated, or is the whole proceeding in violation of the 5th, 6th, and 14th Amendments to the Constitution of the United States?

3) Is Dr. Cooper's restraint by Dr. George J. Beto, Director of the Texas Department of Corrections constitutional, when his probation has been revoked on the grounds of the violation of an unconstitutional statute, or is the restraint unconstitutional and in violation of the 5th, 6th, and 14th Amendments to the Constitution of the United States?

STATUTORY PROVISIONS

Article 1, 1 Vernon's Texas Penal Code 3,
DESIGN OF THE CODE

"The design of enacting this Code is to define in plain language every offense against the laws of this State, and affix to each offense its proper punishment."

Article 3, 1 Vernon's Texas Penal Code 6,
PENALTIES MUST BE AFFIXED BY WRITTEN LAW

"In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this State."

Article 1191, 2A Vernon's Texas Penal Code 429,
ABORTION

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

Article 1192, 2A Vernon's Texas Penal Code 433,
FURNISHING THE MEANS

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice."

Article 1193, 2A Vernon's Texas Penal Code 434,
ATTEMPT AT ABORTION

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated

to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

Article 1194, 2A Vernon's Texas Penal Code 435.
MURDER IN PRODUCING ABORTION

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

Article 1196, 2A Vernon's Texas Penal Code 436.
BY MEDICAL ADVICE

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

Article 11.07, 1 Vernon's Texas Code of Criminal Procedure. 1969 Supp. 47, HABEAS CORPUS,
PROCEDURE AFTER CONVICTION

"After indictment found in any felony case, and before conviction, the writ must be made returnable in the county where the offense has been committed.

After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas. The writ may issue upon the order of any district judge, and said judge may upon presentation to him of a petition for said writ, set the same down for a hearing as to whether the writ should issue, and ascertain the facts, which facts shall be transmitted to the Court of Criminal Appeals with the return of the writ if same is issued after such hearing. Provided further, that should such writ be returned to the Court of Criminal Appeals without all the facts deemed necessary by the Court of Criminal Appeals, said court may designate and direct any district judge or judges of this state to ascertain the

facts necessary for proper consideration of the issues involved. When a petition for writ of habeas corpus presented to the judge of the convicting court contains sworn allegations of fact, which, if true, would render petitioner's confinement under the felony conviction illegal, the attorney representing the state in said court and the Attorney General of Texas shall be afforded an opportunity to answer such allegations, and if it appears that there are issues of fact which are material on the question of whether the petitioner is illegally restrained which have not been resolved, the petitioner may be granted a hearing on such issues of fact and the judge conducting such hearing shall make and file his findings of fact and conclusions of law. It shall be the duty of the offical court reporter of the district judge or judges so designated to forthwith prepare a narration of the facts adduced in evidence upon any such hearing and transmit the same, together with the judge's findings of fact and conclusions of law, to the clerk of the Court of Criminal Appeals within ten days of the date of such hearing. And it shall be the duty of the district clerk of the county wherein the writ is issued to make up a transcript of all pleadings in such case and to transmit the same within thirty days to the clerk of the Court of Criminal Appeals. Provided, that upon good cause shown, the time may be extended by the Court of Criminal Appeals for filing of such narration of facts or transcript.

The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the petitioner to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisioner.

Upon any hearing by a district judge by virtue of this Act, the attorney for petitioner, and the state, shall be given at least three full day's notice before such hearing is held."

Article 42.12, 5 Vernon's Texas Code of Criminal Procedure 270,

ADULT PROBATION AND PAROLE LAW

"Sec. 2b. 'Probation' shall mean the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition of sentence is suspended;"

"Sec. 6. The court having jurisdiction of the case shall determine the terms and conditions of probation and may, at any time, during the period of probation alter or modify the conditions; provided, however, that the clerk of the court shall furnish a copy of such terms and conditions to the probationer, and shall note the date of delivery of such copy on the docket. Terms and conditions of probation may include, but shall not be limited to, the conditions that the probationer shall:

a. Commit no offense against the laws of this State or of any other State or of the United States; * * * "

"Sec. 7. At any time, after the defendant has satisfactorily completed one-third of the original probationary period for two years of probation, whichever is the lesser, the period of probation may be reduced or terminated by the court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court has discharged the defendant

hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of this said conviction or pleas of guilty shall be made known to the court should the defendant again be convicted of any criminal offense."

"Sec. 8. At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. Thereupon, the court shall cause the defendant to be brought before it and after a hearing without a jury, may either continue or revoke the probation and, if probation is revoked, shall proceed to dispose of the case as if there had been no probation. * * * "

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment 14, Sec. 1

" * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CONSTITUTION, Amendment 1

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; * * *"

UNITED STATES CONSTITUTION, Amendment 4

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *"

UNITED STATES CONSTITUTION, Amendment 5

"* * * nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the process of law; * * *"

UNITED STATES CONSTITUTION, Amendment 6

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

UNITED STATES CONSTITUTION, Amendment 8

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

UNITED STATES CONSTITUTION, Amendment 9

"The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

STATEMENT OF CASE

The petitioner, Dr. W. B. D. Cooper, is illegally restrained of his liberty by Dr. George J. Beto, Director of the Texas Board of Corrections, at the Texas State Penitentiary at Huntsville, Walker County, Texas. Dr. Cooper, a medical doctor, a long-time practicing physician in Midland, Midland County, Texas, was convicted by the 142nd Judical District Court of Midland County, Texas, of the felony offense of driving while intoxicated, subsequent offense, and placed on probation for five years, on January 6, 1967. On July 8, 1968, a petition was filed to revoke Dr. Cooper's probated sentence on the grounds that he had committed an offense against the state, an attempted abortion on Jymlin Kaye Essary, one of his patients. After a hearing in the district court, during which no constitutional issues were raised, Dr. Cooper's probation was revoked on July 26, 1968. The revocation of probation was appealed without raising any constitutional issues to the Texas Court of Criminal Appeals, which court on December 3, 1969, affirmed the order of revocation of probation in *Cooper v. State*, 447 S.W.2d 179 (Tex. Crim. 1969). On December 24, 1969, while Dr. Cooper was in jail in Midland, Texas, an untimely application for writ of habeas corpus was filed in the U. S. District Court for the Western District of Texas, Midland-Odessa Division. This application was denied on January 6, 1970. No constitutional issues had been raised at any time in the state court prior to this attempt to invoke the jurisdiction of the federal court. The petitioner had not complied with the requirements of 28 U.S.C. Sec. 2254.

On June 17, 1970, a three-judge court in the U. S. District Court for the Northern District of Texas, Dallas Division, in *Roe v. Wade* held the Texas abortion laws unconstitutional. The opinion and judgment in *Roe v. Wade* were made available to the district court and the Texas Court of Criminal Appeals and are a part of the record in *Ex Parte Cooper*, and are included in the record thereof filed with the Clerk of the Supreme Court at pages 37-51.

On July 7, 1970, Dr. Cooper filed his application for habeas corpus in the 142nd District Court of Midland County, Texas, for the purpose of raising all constitutional issues and exhausting state remedies. The procedure was that prescribed by Art. 11.07, Vernon's Texas Code of Criminal Procedure. The application is filed with the convicting court, after final conviction the writ must be made returnable to the Court of Criminal Appeals of Texas. The trial court set the matter for hearing on July 17, 1970, at which time the constitutional issues were formally raised by petitioner, and additional evidence introduced in order to complete the record and fully present the constitutional aspects of the case. Appendix A at page 1a is the judgment and findings of fact and conclusions of law made and entered by the 142nd District Court as called for by Article 11.07. The entire record was transmitted to the Texas Court of Criminal Appeals and presented to that court on July 27, 1970, and denied without written order or opinion on September 4, 1970. As shown by the Certificate of the Clerk of the Court of Criminal Appeals, Appendix B at page 5a herein, the petitioner has exhausted his state remedies and the matter has now become final.

In *Ex Parte Cooper*, Dr. Cooper prayed for relief on the grounds that the revocation of his probation was unconstitutional since based on an unconstitutional statute, the attempted abortion law, and that his restraint was illegal and in violation of the United States Constitution, that he was entitled

to have his sentence set aside and be restored to the status of probationer, since his sentence and confinement were a direct result of a fundamentally defective revocation of probation proceeding.

A short resume of the background of Dr. Cooper is as follows: Dr. Cooper was born December 7, 1918, and graduated from Meharry Medical College, Nashville, Tennessee, December 17, 1944. He is a medical doctor, a colored physician, licensed to practice medicine and surgery in the State of Texas, and engaged in the general practice of medicine in Midland, Midland County, Texas, at all times in question. On December 4, 1968, after the revocation of Dr. Cooper's probation, the Texas Board of Medical Examiners cancelled and revoked Dr. Cooper's medical license because of the felony conviction. Dr. Cooper appealed the cancellation and revocation of his medical license to the 142nd District Court which temporarily enjoined the action of the Texas Board of Medical Examiners. All this is set forth in the record of *Ex Parte Cooper*.

The entire transcript of the revocation proceedings is set forth at pages 125-234 in the record of *Ex Parte Cooper* filed with the Clerk of the Supreme Court and reflects the following facts surrounding the attempted abortion performed on Jymlin Kaye Essary:

> Barry Coakley telephoned Dr. Cooper in Midland, Texas, from Amarillo, Texas, and told him that he and his girl friend were in trouble, and made preliminary arrangements and an appointment with Dr. Cooper. Barry Coakley and Jymlin Kaye Essary drove from Amarillo, Texas, to Midland, Texas, on the morning of June 6, 1968, and saw Dr. Cooper at 9:30 a.m. Jymlin Kaye Essary stated that the occasion for seeing Dr. Cooper was that "He was to perform an abortion." Barry Coakley testified

"... the agreement was that everything would be completed by the following Saturday, which was a space of 3, 4 or 5 days, something like that." The operation was begun on June 6, 1968. Shortly after midnight that night, there were several telephone calls from Barry Coakley in Amarillo to Jymlin Kaye Essary in Midland. Barry Coakley returned to Midland, arriving about 6:30 or 7:00 a.m. the next morning. He immediately told Dr. Cooper he "... had come to take Miss Essary." Thereupon, the operative procedure was prematurely interrupted and terminated, and Barry Coakley and Jymlin Kaye Essary returned to Amarillo, starting back shortly after 8:00 a.m. the morning of June 7, 1968. The operative procedure was completed in Amarillo, Texas, by another physician. Dr. Cooper did not testify.

The federal questions sought to be reviewed were raised in the application for writ of habeas corpus in *Ex Parte Cooper*, again in the proceedings before the trial court at the first stage of the Art. 11.07 proceedings, and again in the petitioner's brief, filed with the trial court, and transmitted to the Texas Court of Criminal Appeals. The statement of facts developed at the Art. 11.07 hearing on the application for writ of habeas corpus is set forth at pages 63-97 of the record of *Ex Parte Cooper*, and the exhibits introduced therein immediately follow. The applicant's brief is set forth at pages 28-61 of the record.

The essence of the petitioner's constitutional contentions are set forth at page 3 of the record and are as follows:

"The relationship between me, [Dr. Cooper] and the pregnant woman named in the petition for revocation, Jymlin Kaye Essary, was a voluntary

relationship between a physician and his patient. The Texas abortion laws, which include attempted abortion, Arts. 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code are in violation of the Constitution of the United States, the 14th Amendment thereto, and the Amendments included therein. The Texas abortion laws are repugnant to the Constitution of the United States for vagueness, are unconstitutionally archaic and under contemporary social conditions in light of modern scientific and medical advancements are no longer operative and effective in their practical application as a valid and constitutional exercise of the police power, insofar as they apply to a trained physician, such as myself, and involve acts arising out of the physician-patient relationship. The Ninth Amendment of the United States Constitution guarantees to a woman the right to choose whether to have children. A statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional over-breadth in the Texas abortion laws because the Texas legislature did not limit the scope of the statutes to such interests. The Texas statutes sweep far beyond any areas of compelling state interests. In the exercise of her constitutional right to choose whether to bear the child she is carrying, the woman has the right to consult and engage the services of a physician. Under the Texas law in order to assist his patients in the exercise of their constitutional right, the physician must act so as to render criminal liability a likelihood for himself under the Texas abortion laws. Article 1196 of the Texas abortion law is so vague as to deprive him of warning of what produces criminal liability in that portion of his medical practice and consultations concerning abortion.

The Texas abortion laws are unconstitutionally over-broad and unconstitutionally vague. The grave uncertainties of the application of Article 1196 of the Texas Penal Code, and the consequent uncertainty concerning criminal liability under the related abortion statutes, render the Texas abortion laws unconstitutionally vague in violation of the due process clause of the 14th Amendment, particularly insofar as they apply to this petitioner and other physicians under the same circumstances. The abortion laws being unconstitutional, the revocation of probation based thereon, being based on an unconstitutional statute, deprived the petitioner of his rights as guaranteed by the Constitution of the United States, the 14th Amendment thereto, and the other amendments included therein."

The rulings which show that the federal questions were timely and properly raised so as to give this court jurisdiction are found in the findings of fact and conclusions of law set forth in Appendix A at page la of this petition which read as follows:

"1. Petitioner's application is without merit in that it attempts to challenge the authority of the trial court to revoke petitioner's probation by a collateral attack upon the Court's authority to impose sentence. The sentence is valid."

"2. The abortion statutes of Texas were constitutional and valid at the time Petitioner's probation was revoked and Petitioner clearly violated these laws and thus, also violated the terms and conditions of his probation."

The Court of Criminal Appeals as shown in Appendix B at page 5a passed upon and affirmed the trial court's action by

denying the application without written order on September 4, 1970.

REASONS FOR GRANTING WRIT

This is a combined application for writs of habeas corpus and certiorari. The writ of habeas corpus is prayed for since Dr. Cooper is presently confined in the Texas penitentiary, his medical license is in jeopardy, an indictment of abortion is pending against him, and his patients in the negro community stand in need of his medical services. Dr. Cooper prays for an expeditious consideration of his case. Aside from considerations of immediate need, the reasons for granting a writ are practically the same without regard to the nature of the writ prayed for. The court in *Ex Parte Cooper* did not apply federal constitutional standards.

Mr. Justice Stewart explored the vice of unconstitutional vagueness in *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961). That was a non-communist oath case, but the constitutional considerations are essentially the same in all cases of vagueness.

Art. 1196 of the Texas Abortion laws states:

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

What does this mean? This statute which is only remotely intelligible as a matter of language is even less intelligible as a guide to a physician. Saving the life of the mother from what--death, suffering, shame, risk of health and life? How remote must the risk be? What about threats from others, or against herself, or threats to abort herself, or to use an unqualified abortionist? Some authorities say that any abortion

not performed by a qualified physician is a risk to the patient's life. In a strict criminal case this statute is kaleidoscopic, and in a revocation of probation case, where no criminal trial has been afforded, it is a vicious trap. The Texas courts have construed this statute to be an exception to the abortion laws, a defense which the doctor himself must affirmatively assert and prove. When a doctor is charged with abortion, the state does not have to negate this exception. If the doctor does not affirmatively raise it, the benefit of the exception is lost.

In a criminal case, rather than a revocation of probation proceeding which has been held to be a civil proceeding in which no jury is authorized, a defendant would have all kinds of strategic problems, but he would still be entitled to a jury trial, his constitutional right of confronting the witnesses, a presumption of innocence, the burden of proof would be upon the state to prove the whole case beyond a reasonable doubt, he would be entitled to the constitutional guarantee against self-incrimination and an appropriate charge to that effect, together with a motion for a directed verdict before he had to put on any case. Then, he could put on his case before the jury, and if a statutory charge was submitted to the jury, he might be acquitted on a fairly weak presentation of evidence, depending on how some juror construed the phrase "for the purpose of saving the life of the mother." There is an obvious risk and a likely chance that if the court charged the jury on the statute as written, the jury would construe the statute in all kinds of ways, some favorable to the defendant and some unfavorable. On the other hand, if the court tried to define the phrase, the court actually has no intelligent way of putting a concrete construction on this particular mass of words. This is the epitome of the vice of vagueness. In any event, if the defendant were acquitted, after having had all appropriate safeguards, no offense against the state would have been committed for which his probation could be revoked. An acquittal would settle the matter. Dr. Cooper had no trial. He was never charged with an

attempted abortion and the 2-year statute of limitations has now run on the alleged offense.

Now confront a doctor facing revocation of probation with the same statute. He is without the guarantees afforded a criminal defendant, without a criminal trial, without the burden being placed on the state to prove anything "beyond a reasonable doubt", and he is faced with waiving the constitutional guarantee against self-incrimination and with having to take the stand in a civil proceeding prior to any criminal charge having been filed. In order to fall within the statutory exception, he must make admissions and give evidence which he is constitutionally entitled not to make or give, without any protection. He is forced to give testimony which may be the basis of a criminal action in order to protect himself in a civil case, or he can remain silent and lose the benefit of the exception. Even if his probation was not revoked, he could still be charged and tried on the criminal case. He is faced with the same dilemma confronting a person on a motion to suppress when he must take the stand and give evidence, a matter which this court finally decided in *Simmons v. United States*, 390 U.S. 377 (1968), a case which recognized the right of an accused to take the stand and have legal safeguards against the subsequent use of any such testimony. There are no guideline opinions of the Supreme Court setting out the constitutional safeguards of probationers except *Mempa v. Rhay*, 389 U.S. 128 (1967), and *Escoe v. Zerbst*, 295 U.S. 490 (1935). Probationers need at least a minimal guarantee that a revocation of probation will have a recognizable procedure granting due process, equal protection and fundamental fairness.

A lawyer representing Dr. Cooper is in the unenviable position of not knowing which way to turn. Dr. Cooper's trial counsel chose to keep the record as meager as possible and defend without taking any chances. Other counsel would have chosen to have raised all kinds of constitutional questions, and

filed motions probing the vicious statutory scheme with which his client was faced. Different counsel make different choices, depending on their background, but there is no fundamental fairness involved in either choice, as counsel is faced with a vague statutory standard incorporating his own client's professional judgment. Not all counsel are constitutional lawyers, and no probationer wishes to serve a term in the penitentiary while his constitutional rights are being determined. The Supreme Court must establish constitutional guidelines in revocation of probation cases, otherwise many probationers less fortunate than Dr. Cooper are going to be subjected to the same lack of consideration that caused the Texas Court of Criminal Appeals to dodge this issue, without arguments and without written opinion. The Texas Court of Criminal Appeals had the chance to act and chickened out rather than face the constitutional issues themselves.

Analogous to *Cramp v. Board of Public Instruction of Orange County, Florida*, the doctor may, in reliance upon Art. 1196, advise or perform an abortion for the purpose of saving the life of the mother, as he interprets it, and as Mr. Justice Stewart says:

> "The very vice of which he must complain is that the language of the statute is so vague and indefinite that others could with reason interpret it differently."

It is impossible to prepare a defense for a physician under Art. 1196 of the Texas Penal Code in a criminal case, and it is even more impossible to use this vague statute as an exception for a doctor in a revocation of probation proceeding such as Dr. Cooper's. The whole texture of due process and fundamental fairness falls apart in the latter instance. As a practical matter, a probationer has no rights. The revocation procedure in Dr. Cooper's case is repugnant to the Constitution of the United

States and violates the 5th, 6th, and 14th Amendments to the Constitution of the United States. It infringes on the guarantee against self-incrimination and denies a person all the rights under the 6th Amendment which he would have in a criminal proceeding, and denies fundamental fairness, denies due process of law, and denies that certainty of equal protection of the laws to which a probationer is entitled. He can be imprisioned without anything other than a nebulous administrative hearing, and never be given the right to defend himself at a criminal trial as any other person would have.

The probation proceeding provided Dr. Cooper falls short of any standard of fundamental fairness, whether the fundamental fairness be civil or criminal, he has been deprived of all kinds of constitutional needs and guarantees. Add to this the fact that the very statute upon which his probation was revoked was declared unconstitutional in *Roe v. Wade*, and that similar statutes were held unconstitutional in *People v. Belous*, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) *cert. den.* 397 U.S. 915 (1970), *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969) *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970), *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970) (Docket No. 297, Oct. Term, 1970, U. S. Supreme Court), all offspring of *Griswold v. Connecticut*, 381 U.S. 479 (1965), and we have a case that calls for the plenary consideration of these issues by this court.

To base revocation of probation on an unconstitutional statute in a case such as Dr. Cooper's where there was no criminal prosecution on the offense used as the grounds for the revocation of probation violates the 5th, 6th and 14th Amendments to the Constitution of the United States. To sentence a person whose probation has been revoked on the basis of an unconstitutional statute violates the 5th, 6th, 8th, and 14th Amendments to the Constitution of the United States.

For a discussion of the contractual relationship between the court and the probationer under the Texas law, see *McDonald v. State*, 442 S.W.2d 386 (Tex. Crim. 1969), and also Judge Onion's concurring opinion in *Cox v. State*, 445 S.W.2d 200 (Tex. Crim. 1969), where he summarizes the holding of *McBee v. State*, 316 S.W.2d 748 (Tex. Crim. 1958), as follows:

> "... the right of the Court to revoke is limited to those violations of probation alleged in the motion to revoke filed before the expiration of the probationary period." p. 202.

In Dr. Cooper's case, the revocation of probation was during the probationary term, but the unconstitutionality of the Texas abortion laws vitiated the revocation proceedings and all subsequent judicial actions based thereon.

The Supreme Court in *Ex Parte Siebold*, 100 U.S. 371 (1880), beginning on page 376, states the effect of an unconstitutional law:

> "... An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment ..."

To revoke the probation of a person on the basis of an unconstitutional statute is an offense against that person and not an offense against the state. The questions raised in this case are of constitutional proportions and are of such importance to our constitutional jurisprudence that this court should hear arguments, and after due deliberation, grant petitioner the relief sought and order him restored to the status of probationer, so that the ends of justice may be served.

Respectfully Submitted,

By: Charles E. Benson

CHARLES E. BENSON

BARBARA S. BENSON

Benson & Benson
512 Citizens Tower
Lubbock, Texas 79401

HAROLD B. JONES

405 North Big Spring
Midland, Texas 79701

Counsel for Petitioner

STATE OF TEXAS)
)
COUNTY OF LUBBOCK)

CHARLES E. BENSON, being duly sworn, deposes that he is counsel for petitioner; that he has read the foregoing petition and that to the best of his information and belief the facts therein stated are true.

Charles E. Benson

Subscribed and sworn to before me this 21 day of October, 1970.

Alan L. Yaffe

ALAN L. YAFFE, Notary Public in and for Lubbock County, Texas

My Commission expires June 1, 1971.

PROOF OF SERVICE

I, Charles E. Benson, counsel for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of October, 1970, I served six (6) copies of the foregoing Motion for Leave to File Petition for Writ of Habeas Corpus and combined Petition for Writ of Habeas Corpus and Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas, by mailing three (3) copies in a duly addressed envelope by airmail, airmail postage prepaid, to Crawford C. Martin, Esq., Attorney General of Texas, Box "R", Capitol Station, Austin, Texas, 78711, and by mailing three (3) copies in a duly addressed envelope by first-class mail, postage prepaid to James A. Mashburn, Esq., District Attorney for Midland County, Texas, Midland County Courthouse, Midland, Texas, counsel for the Respondent, Dr. George J. Beto, Director of the Texas Department of Corrections.

Charles E. Benson

CHARLES E. BENSON

Counsel for Petitioner

APPENDIX A

IN THE 142ND JUDICIAL DISTRICT COURT OF
MIDLAND COUNTY, TEXAS

EX PARTE	)	CAUSE NO. 4084
W. B. D. COOPER	)	ANCILLARY PROCEEDINGS

JUDGMENT

On this the 17th day of July, A.D., 1970, came on for hearing Petitioner's application for Writ of Habeas Corpus with Petitioner and his attorney present and the State represented by the District Attorney of Midland County, Texas.

Petitioner's application having been presented to the Court as well as evidence, briefs, and arguments from petitioner's counsel as well as the attorney representing the State, the Court finds as follows:

FINDING OF FACTS

1.

Petitioner, W. B. D. Cooper, was convicted January 6, 1967, in the 142nd Judicial District Court of Midland County, Texas, of the felony offense of unlawfully driving a motor vehicle while intoxicated upon a public highway subsequent to a prior conviction for the misdemeanor offense of driving an automobile while intoxicated, upon a public highway, and was assessed a term of five years in the penitentiary. This Court ordered the imposition of this five year sentence to be suspended and placed the petitioner on probation with the statutory terms and conditions of probation, including therein that, "He commit no offense against the laws of this or any other State, or the United States."

2.

After the State had filed its motion to revoke the probation of petitioner, and after notice and hearing, an order was entered by the Court on July 26, 1968, revoking the probation of Petitioner for a violation of the Terms and conditions of his probation, in that, petitioner was found to have committed an offense against the laws of the State of Texas during the period of time for which this Court had placed him on probation. Sentence was thereupon pronounced against Peititoner and he subsequently appealed to the Court of Criminal Appeals of Texas.

3.

The appeal of Petitioner's conviction to the Court of Criminal Appeals of Texas was docketed in that court as Cause No. 42,002 and was subsequently affirmed on December 3, 1969.

4.

On December 24, 1969, in Cause No. MO-69-CA-111 in the United States District Court for Western District of Texas, Midland-Odessa Division, petitioner filed his application for Writ of Habeas Corpus, which said application was found to be without merit and the statutes assailed by affiant were found to be valid, and further that there was no abuse and discretion in the trial court in revoking petitioner's probation. The order denying petitioner's application was entered January 6, 1970.

5.

The evidence submitted at this hearing consists of the entire transcript including statement of facts in Cause No. 3416, the State of Texas vs. W. B. D. Cooper from the District Court

of Midland County, Texas, the opinion of the Court of Criminal Appeals of Texas, Cause No. 42,002, and Judgment in the United States District Court for Western District of Texas, No. MO-69-CA-111. No witnesses were called to testify. The only additional evidence not contained in the above mentioned documents was a certification submitted by petitioner that he was licensed to practice medicine in the State of Texas, Amended Order Granting Temporary Injunction regarding Petitioner's medical license, and certifications of the District Clerk and County Clerk of Midland County that no criminal charges were pending which arose out of the fact situation alleged as grounds for revocation in Petitioner's original hearing, and a certified copy of the pending indictment in this Court of Cause No. 3979, charging the Petitioner with the offense of abortion, this indictment arising out of the fact situation completely separate from the one alleged by the State at its petition for revocation.

CONCLUSIONS OF LAW

1.

Petitioner's application is without merit in that it attempts to challenge the authority of the trial court to revoke petitioner's probation by a collateral attack upon the Court's authority to impose sentence. The sentence is valid.

2.

The abortion statutes of Texas were constitutional and valid at the time Petitioner's probation was revoked and Petitioner clearly violated these laws and thus, also violated the terms and conditions of his probation.

It is therefore ORDERED, ADJUDGED, AND DECREED that said application for Writ of Habeas Corpus be, and is

hereby DENIED, and the Court determines that a bond should not be set in this case and therefore Denies the release of the Petitioner on bond pending final determination.

/s/ Perry D. Pickett

DISTRICT JUDGE
142nd Judical District Court of
Midland County, Texas

APPENDIX B

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, GLENN HAYNES, CLERK of the Court of Criminal Appeals of Texas do hereby certify that in Application No. 3014:

Ex Parte W. B. D. Cooper

(Trial Court No. 4084 in the District Court of Midland County)

the original Petition for Writ of Habeas Corpus was presented to this Court on July 27, 1970 and same was denied without written order, on September 4, 1970.

THEREFORE, with the denying of Relator's Petition for Writ of Habeas Corpus, this matter was disposed of by this Court, in so far as the questions involved are concerned, on September 4, 1970, Relator having exhausted his remedies in this, the Court of Criminal Appeals of Texas, and said matter has now become final, on the questions involved, in this Court.

WITNESS my hand and the Seal of said Court, at office, in Austin, Texas, the 6th day of October, A.D. 1970.

/s/ Glenn Haynes

GLENN HAYNES, CLERK
COURT OF CRIMINAL APPEALS

LIBRARY
SUPREME COURT, U. S.

FILED
NOV 19 19[illegible]
E. ROBERT SEAV[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

* * *

NO. 893

* * *

W. B. D. COOPER,

Petitioner

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

* * *

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

JO BETSY LEWALLEN SZEBEHELY
Assistant Attorney General

Attorneys for Respondent
P. O. Box 12548, Capitol Station
Austin, Texas 78711

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

* * *

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W. B. D. COOPER,

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v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

* * *

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Dr. George J. Beto, Respondent herein and files this response in reply to Petitioner's Application for Writ of Certiorari heretofore filed herein.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 447 S.W.2d 179 (Tex.Crim. 1969), and is attached to Respondent's Brief in Opposition as Appendix "A."

JURISDICTION

This Court does *not* have jurisdiction of the issue raised by Petitioner as his Application for Writ of Certiorari was not filed within ninety (90) days after the entry of judgment by the Court of Criminal Appeals of Texas.

While Petitioner denominated the instrument he filed in this Court to instigate the present proceeding both a Motion for Leave to File Petition for Writ of Habeas Corpus; Petition for Writ of Habeas Corpus, *and* Petition for Writ of Certiorari, he was informed by the Supreme Court Clerk's Office that the matter had been docketed only as a Petition for Certiorari and that said Petition for Certiorari was all that needed a response. (See Respondent's Appendix "B," appended hereto.)

Petitioner purports to invoke jurisdiction under the terms of 28 U.S.C. 1257(3) but he cites no authority for the proposition that the denial of a state court application for writ of habeas corpus by the Texas Court of Criminal Appeals constitutes a "final judgment" as contemplated by 28 U.S.C. 1257(3). The only authority he cites is his "Appendix B," wherein he attempts to reflect compliance with the requirements of 28 U.S.C. 1257(3) by attaching an affidavit from the Clerk of the Texas Court of Criminal Appeals. In said affidavit, the Clerk states:

> ". . . Therefore, with the denying of Relator's Petition for Writ of Habeas Corpus, this matter was disposed of by this Court, insofar as the questions involved are concerned, on September 4, 1970, Relator having exhausted his remedies in this, the Court of Criminal Appeals of Texas, and said matter has now become final. . . ."

Respondent respectfully contends that in all due re-

spect to the Clerk of the Texas Court of Criminal Appeals, said affidavit by him constitutes no authority at all on the legal question as to whether or not Petitioner has exhausted his state court remedies, and/or whether the denial of a state court writ constitutes a "final judgment" as contemplated by 28 U.S.C. 1257(3). Such questions are solely legal questions and are not subject to determination by the Clerk of the Court.

Petitioner is attempting to circumvent the correct certiorari procedure in stating that he wants to review the judgment of the Court of Criminal Appeals entered on September 4, 1970. The September 4th date is the date of denial of his Application for Writ of Habeas Corpus without written opinion by the Court. Petitioner's probation was revoked on July 26, 1968; said revocation was appealed, and on October 22, 1969, the Texas Court of Criminal Appeals affirmed Petitioner's probation revocation. (See Appendix "A".) Rehearing was denied on December 3, 1969, and on December 5, 1969, the Mandate issued. Under normal circumstances the ninety (90) days should have started running from that date and therefore, expired March 5, 1970, the last day on which a timely Application for Certiorari could have been filed. Petitioner has not, therefore, filed this petition within the ninety (90) day period required by Rule 22(1), Revised Rules of the Supreme Court of the United States.

Respondent will, however, answer the allegations of Petitioner in the event that this Court decides that jurisdiction to entertain said matter does lie.

QUESTIONS PRESENTED

Respondent disagrees with Petitioner that any questions of federal constitutional dimension are involved.

ARGUMENT

Although Respondent submits, as aforesaid, that this Honorable Court lacks jurisdiction to entertain said lawsuit, there is at least one obvious reason, among others, why the Application for Writ of Certiorari should be denied:

(1) *Petitioner's probation was revoked because he attempted to perform an abortion, in violation of a constitutional law of the State of Texas and in violation of the terms of his probation.*

While it is true that an attack was later made on the constitutionality of the Texas abortion laws, i.e., Arts. 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code, see *Roe v. Wade,* —— F.Supp. —— (C.A. No. 3-3691-C, D.C. Northern District, decided June 19, 1970), said laws were valid, constitutional laws of the State of Texas at the time Petitioner's probation was revoked, on July 26, 1968. Furthermore, as the opinion in *Roe v. Wade,* supra, reveals, the federal court declined to grant injunctive relief against the State of Texas whereby enforcement of the abortion laws would have been enjoined, and said decision is not final, anyway, as the case is currently on appeal.

Finally, after the issues on appeal are fully resolved, and assuming arguendo, that the abortion laws are declared unconstitutional, there certainly appears no reason to believe that such holding will automatically be applied retroactively.

In any event, the real issue is whether or not Petitioner's probation should have been revoked, i.e., did Petitioner violate the terms of his probation—*not* the constitutionality of the Texas abortion laws.

CONCLUSION

Since this Honorable Court lacks jurisdiction to review the instant question and no constitutional right has been denied Petitioner, the Application for Writ of Certiorari should be denied.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

JO BETSY LEWALLEN SZEBEHELY
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Jo Betsy Lewallen Szebehely, a member of the Bar of the Supreme Court of the United States, do hereby certify that copies of the above and foregoing Brief for Respondent in Opposition have been served on counsel for the Petitioner by depositing same in the United States Mail, postage prepaid, addressed to Mr. Charles E. Benson, Benson & Benson, 512 Citizens Tower, Lubbock, Texas 79401 and Mr. Harold B. Jones, 405 North Big Spring, Midland, Texas 79701, this the ---- day of November, 1970.

JO BETSY LEWALLEN SZEBEHELY
Assistant Attorney General

W. B. D. COOPER, Appellant,

v.

The STATE of Texas, Appellee.

No. 42002.

Court of Criminal Appeals of Texas.

Oct. 22, 1969.

Rehearing Denied Dec. 3, 1969.

Proceeding on appeal from an order of the 142nd Judicial District Court, Midland County, Perry D. Pickett, J., revoking probation. The Court of Criminal Appeals, Belcher, J., held that evidence sustained finding that defendant, who had been granted probation on condition that he commit no offense against laws of state, committed offense of attempted abortion on female during period of probation.

Judgment affirmed.

1. Criminal Law ⇐982.9(6)

Hearing upon whether probation should be revoked is not a criminal trial. Vernon's Ann.C.C.P. art. 42.12.

2. Criminal Law ⇐1147

Sole issue on appeal from revocation of probation is whether judge abused his discretion in revoking probation that had been granted. Vernon's Ann.C.C.P. art. 42.12.

3. Criminal Law ⇐982.9(5)

Evidence sustained finding that defendant, who had been granted probation on condition that he commit no offense against laws of state, committed offense of attempted abortion on female during period of probation. Vernon's Ann.C.C.P. art. 42.12.

Legg, Saxe & Baskin, by Pat M. Baskin, Midland, Lucius D. Buntin, Odessa, for appellant.

James A. Mashburn, Dist. Atty., Midland, and Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

BELCHER, Judge.

This is an appeal from an order revoking probation.

Upon his plea of guilty before the court on January 6, 1967, the appellant was found guilty of the felony offense of driving while intoxicated and his punishment was assessed at a term of five years. Probation was granted.

Among the conditions of his probation was that he commit no offense against the laws of this State.

On July 22, 1968, the attorney for the state in Midland County filed an amended motion to revoke probation alleging:

"That on or about the 6th day of June, A.D., 1968, in the County of Midland and State of Texas, W. B. D. Cooper (appellant) did unlawfully, willfully, and designedly attempt to produce an abortion on one _____[1] then and there a pregnant woman, by then and there thrusting and forcing into the womb and private parts of the said _____, with her consent, a certain instrument calculated to produce an abortion upon her, the said _____, against the peace and dignity of the State."

After a hearing on the state's motion to revoke, the court entered an order revoking the probation upon a finding that the evidence adduced sustained the allegations of the state's motion.

For reversal, the appellant urges the following grounds:

"The court erred in revoking appellant's probation for the reason that the elements of the offense of attempted

1. Blank spaces indicate names appearing in the record which are omitted.

abortion were not established by the evidence presented in appellant's revocation hearing."

"The court erred in revoking appellant's probation for the reason that there is no evidence that the events presented at the revocation hearing occurred after the appellant was placed on probation."

On the hearing of the motion, the following evidence was adduced:

The complainant, a female, age 21, with a male companion, age 25, arrived in Midland from Amarillo by automobile about 8 a. m., on June 6, and she first saw the appellant, Dr. Cooper, with whom she had an appointment that day about 9:30 a. m., in his office in Midland.

The complainant testified in part as follows:

"Q Did you talk with Dr. Cooper at that time (9:30 a. m.)?

"A Yes.

"Q What was the nature of your conversation with him, please, mam?

"A He asked me how far along I was, and that was it.

"Q Did you answer his questions?

"A Yes.

"Q What did you tell him?

"A I told him that I was 12 weeks and four days.

"Q What happened then?

"A Well, the financial part of the transaction was discussed between him and Mr.

"Q Were you present at that time?

"A Yes.

* * * * * *

"Q What happened after the financial arrangements were made, please?

"A I was taken into an examining room.

"Q Was that there at Dr. Cooper's office?

"A Yes.

"Q All right, and what happened there?

"A His nurse prepared me for whatever was to happen, and she had an assistant with her. And then Dr. Cooper came in and gave me a shot for some reason to knock me out.

"Q Do you remember whether the assistant was male or female?

"A Male.

"Q And when you said they prepared you, what do you mean by that?

"A Well, of course, they took all my clothes off, as well as I can remember. They took my skirt off—I had on a skirt and blouse, and put a paper sheet over me, of course, and put my feet up to elevate them.

"Q And then Dr. Cooper was not present at this point?

"A No.

"Q All right, when did you next see Dr. Cooper?

"A When he came in to inject the shot.

"Q Did you have any conversation at that time?

"A He said something, but I can't remember what he said.

"Q And Dr. Cooper gave you the shot himself?

"A Yes.

"Q What happened then?

"A I went to sleep.

"Q When did you wake up?

"A It was approximately about 11 o'clock.

* * * * * *

"Q What was your condition at that time? Was anything changed from the time that you had been given the shot, did you notice any difference?

"A Well, yes, bleeding had started and I was just—well I didn't notice anything except my stomach and all felt extremely full.

* * * * * *

"Q All right, and then where did you go?

"A To Dr. Cooper's home.

* * * * * *

"Q Who took you there?

"A His nurse.

* * * * * *

"Q During this period of time, up to that point of time, had you been given any type of medication?

"A When I got up at seven she gave me a pill, a little white pill.

"Q Had there been any dressing or any medication in that regard?

"A No.

* * * * * *

"Q And when did you next see Dr. Cooper?

"A * * * I saw Dr. Cooper the next morning.

"Q And where was that? was that still in his home?

"A Yes.

"Q And about what time was that, do you recall?

"A Approximately eight o'clock.

"Q And what transpired at that time?

"A Well, I was informed that I was being taken home, and first of all I would need to go to Dr. Cooper's office for him to remove packing from me, and we left, his nurse, and some other man was there, and Dr. Cooper, and we went to his office where he removed the packing.

"Q Did Dr. Cooper himself do that?

"A Yes.

* * * * * *

"Q What happened after the packing was removed?

"A I was given a shot in case infection started.

"Q And then what?

"A And then we went back over to Dr. Cooper's home, and then proceeded to go home.

"Q Did you have any conversation with Dr. Cooper at that time?

"A Yes.

"Q What was the nature of that conversation?

"A Well, he told me at that time that I would need to see a doctor after I passed the fetus. There would be no need until then. And also that I wouldn't tell anyone what had happened.

* * * * * *

"Q And what happened after you got to Amarillo?

"A Well, I went by and saw my sister-in-law, and then I went home, and then about 7 o'clock my brother called and said they had all decided that it would be time—that I should go to the doctor, go to the hospital. So I called my family physician and he recommended Dr. Patterson, and I called him and made an appointment with him.

"Q And were you having any physical problems at this time?

"A Well I was hurting a lot.

"Q Where did you go after you had made the appointment with Dr. Patterson?

"A I went to the hospital.

* * * * * *

"Q And what happened there at the hospital?

"A Well, I went to the emergency room, and checked in and Dr. Patterson came in, and examined me and removed something, I don't even know what, and told me I was going to have to be put in the hospital.

"Q How long did you remain in the hospital?

"A Two and a half days.

"Q Before you went to the hospital in Amarillo, had you passed the fetus?

"A No.

* * * * * *

"Q Were you given any medication to take by Dr. Cooper to take with you?

"A No; I was given several pills before I left.

"Q Did you take those?

"A I took all but the last one.

"Q Did you know the purpose of them?

"A I was told they were for induced labor."

The male companion of the complainant testified in part as follows:

"Q Are you acquainted with the defendant in this action, Dr. W. B. D. Cooper?

"A Yes.

"Q When did you first become acquainted with him?

"A In a telephone conversation, sir, on June 5.

"Q And did you talk with Dr. Cooper yourself?

"A Yes, sir.

"Q And what was the nature of that conversation, please, sir?

"A I told him that myself and a girl friend of mine were in trouble, and he then asked me how far along she was, and I told him. And we discussed the time, place, and financial arrangements.

"Q Now when you say 'time, place and financial arrangements', specifically what did you discuss, please?

"A Well, we decided—the agreement we decided on, sir, was the following morning approximately 8 o'clock or 8:30 at his office, and the agreement over the phone was $400 cash, an automobile, and perhaps a check for the balance; * * *.

* * * * * *

"Q Did Dr. Cooper then come in and discuss this matter with you?

"A Yes, sir.

"Q What happened when Dr. Cooper arrived?

"A He came in and we exchanged good morning, and he—I think his first question to Miss _____ was how far along she was, and then did I have the payment, I can't remember the word that was used, money, payment, whatever, and I said yes. * * *

* * * * * *

"Q Now besides the financial arrangements, do you recall any other conversation with Dr. Cooper at the time?

"A I have no clear recollection of—I think Miss _____ and myself both asked him how long it would take or something about the operation of it, which we could understand, I mean how long it would take, what would happen, a sort of tentative time schedule.

"Q And what was the time schedule given you, if you recall?

"A I can't remember what day June 5th was on, but I think the agreement was that everything should be completed by the following Saturday, which was a space of three, four or five days, something like that.

"Q What happened after your conversation with Dr. Cooper and the financial arrangements?

"A Well, Miss _____ and—Miss _____ went into another room, and I think shortly thereafter Dr. Cooper went into the room. I can't remember whether he went with her—I don't think he did, I think he asked his nurse to show her into another room.

* * * * * *

"Q And when did you next see Miss _____?

"A About—this is very vague, about two hours after we had first talked to Dr. Cooper.

"Q Where did you see her?

"A She was reclining in a bed, and under sedation of some sort.

* * * * * *

"Q Where did you go after you arrived here? (On return from Amarillo)

"A I went to Dr. Cooper's home.

"Q What happened there?

"A I knocked on the door, and another gentleman answered, and I told the gentleman that I would like to see Dr. Cooper, which I saw him and talked to him, and told him I had come to take Miss _____.

"Q What happened then?

"A He said, 'Fine.' He said, 'I'll have to take her down to my office, and * * *' and I forget what he said he had to do, but he said he had to take her to his office first, before I would take her with me. I don't know really what he said he had to do, I couldn't say.

"Q And did he take her to his office?

"A Yes.

"Q What happened then?

"A The friends who rode down with me and myself waited in Dr. Cooper's home until he and Miss _____ and his—I don't remember how many were with them, but they came back, bringing Miss _____, and then we left for Amarillo."

An Amarillo physician testified that:

"A I was contacted by telephone by _____ about 8:30, or possibly a little earlier on the night of the 7th of June, by telephone. She stated her complaint, stated that Dr. Ralph Carroll of Amarillo, Texas, had been her physician and he had referred her to me, stated that she had been bleeding and cramping since early morning, the morning of the 7th of June, that her symptoms had become progressively worse, and could I see her in the emergency room at _____ Hospital, or rather could I see her in the emergency room, and I directed her to _____ Hospital emergency room at that time.

"Q Did you see there at the hospital?

"A I saw her subsequently in the emergency room at _____ Hospital approximately at nine o'clock (p. m.).

* * * * * *

"Q Dr. _____, this that you are referring to, did you write that yourself?

"A This is in my handwriting.

"Q Once again, you may refer to any notes you want—

"A If it's proper, I'll refer to my office notes that I—copy of which in toto or in essence are the same as are contained in the hospital records.

"Q All right.

"A Miss _____ stated that she was a 21 year old white female who had her 21st birthday, as I remember, in May of 1968. She stated that her last normal menstrual period had been approximately, as I calculated, 15 weeks prior to the time that I had seen her. She had all the subjective signs and symptoms of pregnancy, including nausea, vomiting, breast tenderness, urinary frequency, which led us to

suspect that she was pregnant. At this point she stated that she had been bleeding and cramping as she told me previously over the telephone, since early morning hours of the 7th. At this point in time the most likely diagnosis was that of a threatened miscarriage, threatened abortion. She was examined at this point.

* * * * * *

"Q Now continuing with your examination of her, you were able to determine that she had been pregnant, is that right, that she was pregnant?

"A Miss _____ was pregnant at the time I examined her initially. The mouth of her womb, more importantly was dialated to approximately a centimeter or a centimeter and a half; under normal circumstances the mouth of the womb would be dialated to approximately two tenths of a centimeter. Hanging or extruding from the mouth of the womb was a non-pulsatile cord-like structure, which I suspected was a fetal umbilical cord. This was surgically removed with scissors and sent to the laboratory for pathological examination, and was consequently proven to be a fetal umbilical cord.

* * * * * *

"Q Specifically what did you observe in relation to any trauma?

"A Well, under normal circumstances the mouth of the womb tends to be covered with a smooth homogeneous layer of tissue that will be dark bluish or reddish, but has its integrity intact. The tissues at the mouth of Miss _____ womb were a bright red color, and the architecture of the smoothness of the surface had been disrupted by some means.

"Q What other disruption did you observe physically in Miss _____?

"A I thought that there was possibly evidence of tenaculum marks in the anterior lip of the cervix. I couldn't be absolutely positive of this, because they heal very rapidly after the tenaculum is withdrawn. A tenaculum is a sharp two-toothed or four-toothed instrument used to grasp tissues and hold them firm.

"Q Pertaining to the womb and your observations of Miss _____, what did you observe or find in regard to this?

"A I have already stated that, that it was enlarged to approximately a size compatible with a 14 to 16 weeks gestation.

* * * * * *

"Q Were the physical findings that you found consistent with an attempted abortion of Miss _____?

"A Yes, when I found the umbical structure extruding through the mouth of the cervix, * * *.

* * * * * *

"Q Once again, Doctor, did your physical findings comport with the fact that Miss _____ had received instrumentation into her womb in an attempt to abort her pregnancy?

* * * * * *

"A In my opinion manipulation of the mouth of the womb of Miss _____ had been effected by some means in an attempt to cause her to abort."

While testifying the attending physician of the complainant at the hospital in Amarillo, identified the hospital records of the complainant made either by him or at his direction, and they reflect that she arrived at the hospital at 8:30 p. m., June 7, 1968, and was admitted at 9:40 p. m., that day, and was discharged on June 10, 1968.

The appellant did not testify or call any witnesses in his behalf.

[1] The hearing upon whether probation should be revoked is not a criminal trial. Tate v. State, Tex.Cr.App., 365 S.W. 2d 789.

[2] The sole issue on appeal from the revocation of probation is whether the judge abused his discretion in revoking probation that had been granted. Torres v. State, Tex.Cr.App., 403 S.W.2d 135;

McKnight v. State, Tex.Cr.App., 409 S.W. 2d 858; Manning v. State, Tex.Cr.App., 412 S.W.2d 656; and other cases listed under Art. 42.12, Note 38, V.A.C.C.P.

[3] From a consideration of all the facts and circumstances as shown by the evidence introduced on the hearing, it is concluded that the evidence is sufficient to sustain a finding by the trial court that appellant committed the offense of attempted abortion on the female named in the application to revoke probation and did not abuse his discretion in finding that the violation occurred during the period of probation.

The judgment is affirmed.

Ex parte William (Bill) CLUBB.

No. 42552.

Court of Criminal Appeals of Texas.

Nov. 5, 1969.

Rehearing Denied Dec. 3, 1969.

Defendant appealed from an order entered in a habeas corpus proceeding in the 102nd Judicial District Court, Bowie County, Herbert Line, J., remanding defendant to custody for extradition to sister state where he was charged with crime of murder. The Court of Criminal Appeals, Onion, J., held that where defendant made no issue of identity, he was in no position to complain on appeal as to sufficiency of evidence as to identity, that extradition for prosecution for felony was authorized upon basis of complaint and warrant issued thereon, and that where there was no information and sister state was not shown to be seeking to extradite defendant for felony trial based upon information, defendant's reliance upon rule that where demanding state seeks to extradite an accused for felony trial based upon an information in demanding state, there must be showing at habeas corpus hearing that law of demanding state permits such procedure was misplaced.

Affirmed.

1. Extradition ⇐36

Introduction of warrant of state governor was sufficient to make prima facie case authorizing extradiction of person named therein.

2. Extradition ⇐36

Once governor's extradition warrant is placed in evidence, burden is upon person named therein to overcome prima facie proof of existence of every fact which governor was obliged to determine before issuing such warrant.

3. Extradition ⇐36

State, having established prima facie case by introduction of governor's warrant, has no further burden of proof as to identity of accused unless identity is put into issue by accused, and introduction of executive warrant for extradition shifts burden to accused to show that he is not person charged in demanding state.

4. Habeas Corpus ⇐113(5½)

Where defendant sought to be extradited made no issue of identity at habeas corpus proceeding, he was in no position to complain on appeal as to sufficiency of evidence as to identity.

5. Extradition ⇐32, 36

Extradition for prosecution for felony is authorized upon basis of complaint and warrant issued thereon. Vernon's Ann.C. C.P. art. 51.13, § 3.

6. Extradition ⇐32, 36

Person charged in demanding state with felony may be extradited from state upon basis of an affidavit and warrant

issued thereon, and whether, upon person's return to demanding state, he is to be prosecuted upon an indictment or information is not question for state courts to decide in extradition proceedings but is for courts of demanding state.

7. Evidence ⇐83(1)

There is presumption in extradition proceedings that law of demanding state is same as law of asylum state in absence of showing to contrary.

8. Habeas Corpus ⇐103

Where demanding state seeks to extradite an accused from asylum state for felony trial based upon information in demanding state, there must be showing at habeas corpus hearing in asylum state that law of demanding state permits such procedure.

8. Habeas Corpus ⇐103

Where there was no information and demanding state was not shown to be seeking to extradite defendant from asylum state for felony trial based upon information, defendant's reliance upon rule that where demanding state seeks to extradite an accused from asylum state for felony trial based upon information in demanding state, there must be showing at habeas corpus hearing that law of demanding state permits such procedure was misplaced.

Harkness, Friedman & Kusin by Jim Hooper, Texarkana, for appellant.

Crawford C. Martin, Atty. Gen., Austin, Nola White, Hawthorne Phillips, Robert C. Flowers and Gilbert J. Pena, Asst. Attys. Gen., Austin, and Jim Vollers, State's Atty., Austin, for the State.

OPINION

ONION, Judge.

This is an appeal from an order entered in a habeas corpus proceeding remanding the appellant to custody for extradition to the State of Louisiana, where he stands charged by "affidavit made before a magistrate issued together with a warrant thereupon" with the crime of "murder."

At the habeas corpus proceedings at which appellant was represented by counsel, the Executive Warrant of the Governor of this State, regular on its face, the requisition, application for requisition, the affidavit and warrant and other supporting papers were introduced. Thereafter the State rested. The appellant did not testify or offer any evidence at said hearing.

[1] It is well established that the introduction of the Warrant of the Governor of Texas is sufficient to make a prima facie case authorizing extradiction of the person named therein. Ex parte Kronhaus, Tex.Cr.App., 410 S.W.2d 442; Ex parte Juarez, Tex.Cr.App., 410 S.W.2d 444; Ex parte Tine, Tex.Cr.App., 432 S.W.2d 77; Ex parte Wiggins, Tex.Cr.App., 435 S.W.2d 517.

[2] Once the Governor's Warrant is placed in evidence then the burden is upon the person named therein to overcome the prima facie proof of the existence of every fact which the Texas Governor was obliged to determine before issuing the extradition warrant. Ex parte Fant, Tex.Cr.App., 400 S.W.2d 332. See also 25 Tex.Jur.2d, Extradition, § 31, pp. 182–183.

[3] Having established a prima facie case by the introduction of the Governor's Warrant, the State has no further burden of proof as to the identity of the accused unless identity is put into issue by the accused. The introduction of the Executive Warrant shifts the burden to the accused and it is then incumbent upon him to show that he is not the person charged in the demanding state. See Ex parte Moore, Tex.Cr.App., 436 S.W.2d 901; Ex parte Kaufman, 168 Tex.Cr.R. 55, 323 S.W.2d 48 and cases there cited; 39 C.J.S., Habeas Corpus § 39(a), pp. 551–552. Cf. Ex parte Thompson, 171 Tex.Cr.R. 509, 351 S.W.2d

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CHARLES E. BENSON • BARBARA S. BENSON, MRS.

October 30, 1970

Crawford C. Martin, Esq.
Attorney General of Texas
Box (R), Capitol Station
Austin, Texas 78711

Re: Cooper v. Beto
No. 893, October Term, 1970

Dear Sir:

We only docketed the above matter as a petition for writ of certiorari. The Clerk's Office thought that a petition for habeas corpus in addition to the petition for certiorari was unnecessary, so all that is pending in the Supreme Court is the petition for certiorari, and that is all that needs a response.

Enclosed is a notice that the case was docketed on October 23, 1970, as number 893, October Term, 1970, and an appearance form which you are to file with the Supreme Court. I have also sent a copy of the notice and appearance forms to James A. Bashburn.

Very truly yours,

Charles E. Benson

CHARLES E. BENSON

CEB/bg
Enc.